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Columbia River Gorge Commission

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October 29, 1997

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street NW, Room 222
Washington, D.C. 20554

Subject: MM Docket No. 97-182
Preemption Of State And Local Zoning And Land Use Restrictions On Siting Placement And Construction Of Broadcast Station Transmission Facilities

Dear Mr. Caton:

The Columbia River Gorge Commission has reviewed the notice of proposed rulemaking released by the Federal Communications Commission (FCC) under MM Docket No. 97-182 on August 19, 1997. The notice addresses the potential preemption of state and local zoning and land use restrictions for the siting, placement and construction of broadcast station transmission facilities.

I want to begin by explaining the Columbia River Gorge Commission is a regional agency created by virtue of federal legislation and an interstate compact between Washington and Oregon to administer the Columbia River Gorge National Scenic Area in cooperation with the U.S. Department of Agriculture (Forest Service). The Commission's functions are discussed further below but in brief form, the agency has responsibility for protecting the resources of the National Scenic Area and this includes regulating land use and planning outside of the urban areas.

In addition, in the interests of efficiency, I want to advise you that I join in the comments submitted to your agency by the Pinelands Commission, an agency similar to the Gorge Commission. I have attached a copy of a letter to you dated October 29, 1997 from the Executive Director of the Pinelands Commission, Terrence Moore.

Moreover, due to the far-reaching nature of the proposed rule in question, I have prepared my own comments and they are set forth here. You will note I have included both general and specific considerations because I believe the proposed rule warrants searching review and refinement in both its objectives and its scope. With that in mind, please consider the following:

(1) Factual Basis To Proceed

The proposed approach in the notice of rulemaking seems premature. Petitioners have not submitted adequate information to justify the drastic measures proposed. The notice of the agency actually acknowledges this and states as follows: "Although petitioners provide

anecdotal evidence regarding difficulties encountered by several broadcasters...we have no basis on which to determine the extent to which such difficulties are representative of radio and television broadcast industry tower siting experiences generally." (p. 3) It seems that the basis to conclude this approach is necessary should await further review including a determination that a clear need for it actually exists. In relying on mere anecdotal information, petitioners have not met the standard for establishing such a need. Under these circumstances, the agency should consider continuing the matter to a later date when the essential factual predicate exists. At the very least, many organizations are faced with added expenses, increased costs and new obligations by the initiation of these proceedings and thus, even prudential considerations support scheduling it for further study.

(2) Evaluation Of Alternatives

The proposed rulemaking proceeding also seems premature because it is not clear what steps have been taken to identify and consider alternative approaches, including consideration of a range of options.

Moreover, the rulemaking proceeding does not seem ripe because it is not clear whether the agency has applied the requirements of the National Environmental Policy Act (NEPA). NEPA, of course, requires the evaluation of alternatives in the course of considering impacts on the environment.

(3) The Application Of State Law In General

Land use law is created by the states. In general, like property law, land use law is fashioned in accord with the states' legislative branches. The states's exercise of the police power is broad and encompasses virtually every aspect of land use law. In light of this basic principle, the agency needs to further define and clarify exactly what its objectives are as they relate to its own province -- communications. Once these objectives are articulated, it is then possible to analyze and comment further on the precise application of state law. Until that point is reached, the proposal lacks sufficient specificity.

(4) The Application Of Washington And Oregon Law

Washington and Oregon both apply well-defined systems of land use law for purposes of planning and resource management, in addition to the exercise of the police power to protect public health, safety, welfare and the environment. These systems address a broad range of interests extending from aesthetics and historic preservation to siting of commercial facilities and construction standards. A specific proposal for development requires consideration and evaluation of the applicable standards. This authority is especially vital because the police power is not one contained in the federal constitution and exercised by federal agencies.

(5) The Application Of Federal Laws For Special Areas

Special areas of the country are particularly important for the scenic, cultural, natural and recreational resources they contain. Special areas include the Pinelands Natural Reserve, the Lake Tahoe region (including portions of California and Nevada) and, the Columbia River Gorge National Scenic Area. It is noteworthy that all three designations were created pursuant to federal legislation and that includes federal approval of the plans developed for governance of each area.

(6) The Application Of The Columbia River Gorge National Scenic Area Act

1. Background
The Columbia River Gorge National Scenic Area Act was passed by Congress and signed by President Reagan in 1986. The Act created a National Scenic Area and provided the consent of Congress to a compact between Washington and Oregon adopting the legal standards of the Act in state law.

2. Standards
The Act fashioned a uniform set of standards for governing the National Scenic Area and this extends to any new development and especially its impact on the scenic, cultural, natural and recreational resources of the Gorge.

3. Management Plan
The Act required preparation of a Management Plan for the National Scenic Area which provides comprehensive standards for land use and development. These standards ensure the area is managed as a single-unit and not subject to conflicting regulations or policies. Watters, The Columbia River Gorge National Scenic Area Act, 23 Envtl. L. 1127 (1993). In accord with the Act, the Management Plan was reviewed and approved by the Secretary of Agriculture.

4. Implementation
The Act and the Management Plan are implemented in land use ordinances in each of the six counties in the National Scenic Area - three in Washington and three in Oregon. These ordinances must be found consistent with the Management Plan by the Columbia River Gorge Commission and the Secretary of Agriculture. The result is that any future development must comply with the standards for land use in the ordinances. The ordinances include specific requirements which govern the siting of communication facilities. These requirements are essential to protect the scenic, cultural, natural and recreational resources in the National Scenic Area.

With these comments in mind, I believe the recommendation made by the Executive Director of the Pinelands Commission is appropriate and important. Special areas governed by existing federal legislation should not fall within the proposed preemption rule because Congress has already developed a comprehensive program for protecting and managing the resources there.

Thank you for your consideration of my concerns and please do not hesitate to contact me if you would like to discuss them further.

Sincerely,

Jonathan Doherty
Executive Director

Enclosure

cc: Terrence Moore, Pinelands Commission
James W. Baetge, Tahoe Regional Planning Agency

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CHRISTINE TODD WHITMAN
*Governor*

October 29, 1997

William F. Caton
Secretary, Federal Communications Commission
Washington, D.C. 20554

RE: MM Docket No. 97-182
Preemption of State and Local Zoning
and Land Use Restrictions on Siting,
Placement and Construction of
Broadcast Station Transmission Facilities

Dear Mr. Caton:

I am writing with regard to the proposal by the Federal Communications Commission to preempt state and local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities (MM Docket No. 97-182). We are concerned that the proposal fails to recognize areas where federal and state partnerships were created, pursuant to federal legislation, in recognition of such areas' national and international significance. In 1978, Congress determined that there was a national interest in preserving the natural and cultural resources of the Pinelands of New Jersey, and designated the region as The Pinelands National Reserve (P.L. 95-625). This step was taken "to protect, preserve and enhance the significant values of the land and water resources of the Pinelands area" and "to encourage and assist the State of New Jersey and its units of local government in the development of a comprehensive management plan for the Pinelands area in order to assure orderly public and private development in the area." The statute required that a Comprehensive Management Plan (CMP) be developed by the State of New Jersey, and that the plan and any subsequent amendments be approved by the Secretary of the Interior. In response to the federal statute, the State of New Jersey enacted "The Pinelands Protection Act in 1979 which made all local master plans and zoning ordinances subject to the regulatory policies of the CMP.

The Comprehensive Management Plan for the Pinelands National Reserve was approved by the Secretary of the Interior in 1981. It includes an assessment of "scenic, aesthetic, cultural, open space, and outdoor recreation resources of the area together with a determination of overall policies required to maintain and enhance these resources." As a result of the assessment performed by the Pinelands

Commission, the CMP contains a height limitation of 35 feet for any structures, including radio and television transmission and other communication facilities, which are not accessory to an otherwise permitted use, in areas of the region where future growth is severely restricted. Such facilities are currently permitted in locations of the region where less restrictive growth management policies apply under the plan. These regulatory policies were approved by the Secretary of the Interior, as part of his approval of the CMP required under Section 471i.(g) of Section 502 of The Omnibus National Parks and Recreation Act of 1978. As envisioned by the federal and state Pinelands legislation, this standard has been incorporated into the land use ordinances of 51 of the 53 municipalities and the 7 counties which comprise local government in the Pinelands National Reserve. The Pinelands Commission administers the CMP, and ensures that local ordinances are implemented in a manner consistent with the federally approved plan. The Commission is the federally designated planning entity for the Pinelands National Reserve.

For regions such as the Pinelands National Reserve, we believe it would be inappropriate to preempt the state and local zoning and land use ordinances adopted in response to federal legislation. To do so would jeopardize the continued protection of these areas as Congress intended and would fail to recognize longstanding arrangements between the federal and state government concerning the regulatory authority of these lands. Below, for your consideration, is an amendment to the petitioners' rule proposal that we believe would better address these issues in the few regions of the United States that are subject to congressional findings that the resources of same merit national interest.

Section (b)(2): "Any state or local land-use, building, or similar law, rule or regulation that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities, is preempted unless the promulgating authority can demonstrate that such regulation is **the result of federal legislation** or is reasonable in relation to:

(I) a clearly defined and expressly state health or safety objective other than one related to those set forth in Section (1)(I)-(iii) above; and

(ii) the federal interest in (I) allowing federally authorized broadcast operators to construct broadcast transmission facilities in order to render their service to the public; and (ii) fair and effective competition among competing electronic media."

I thank you in advance for your consideration of our concerns. If you have any questions, please do not hesitate to contact me at the above number.

Sincerely,

Terrence D. Moore
Executive Director